

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 24, 2007

JOSEPH D. COMBS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Sullivan County
No. C48,785 R. Jerry Beck, Judge

No. E2006-01241-CCA-R3-PC - Filed July 26, 2007

Petitioner, Joseph D. Combs, was convicted by a jury of especially aggravated kidnapping, aggravated assault, aggravated perjury, aggravated rape, and seven counts of rape. As a result of the convictions, Petitioner was sentenced to an effective sentence of 114 years in incarceration. Petitioner appealed his convictions, presenting various grounds for relief. *See State v. Evangeline Combs and Joseph D. Combs*, Nos. E2000-02801-CCA-R3-CD and E2000-02800-CCA-R3-CD, 2002 WL 31118329 (Tenn. Crim. App., at Knoxville, Sept. 25, 2002), *perm. app. denied*, (Tenn. Jan. 27, 2003). This Court reversed Petitioner's conviction for aggravated perjury and remanded for a new trial on that charge, but affirmed Petitioner's remaining convictions. *Id.* at *83. The Tennessee Supreme Court denied permission to appeal on January 27, 2003. Subsequently, Petitioner sought post-conviction relief on the basis of ineffective assistance of counsel at trial. After a hearing, the post-conviction court dismissed the petition. Petitioner filed a timely notice of appeal. On appeal from the dismissal of the post-conviction petition, Petitioner argues that: (1) trial counsel failed to cite Indiana law at trial to establish a "de facto parent-child relationship" as a defense to the kidnapping charges; (2) trial counsel failed to properly elicit testimony to rebut or explain the victim's claim that she was referred to as a "servant" by Petitioner; (3) trial counsel failed to communicate properly with Petitioner and failed to discuss a defense or defense strategy; (4) trial counsel failed to provide promised evidence to the jury regarding the victim's ulterior motive to testify; and (5) trial counsel failed to use independent medical experts to review medical records and failed to call the victim's attending physician to testify. Because we determine that trial counsel provided Petitioner with effective representation, we affirm the post-conviction court's dismissal of the post-conviction petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Paul A. Harr, Blountville, Tennessee, for the appellant, Joseph D. Combs.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Greeley Wells, District Attorney General; and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The underlying facts of Petitioner's convictions present atrocious acts of abuse committed by Petitioner, a minister, and his wife, Evangeline, against their adopted daughter, the victim, Esther Combs. Petitioner and his wife entered into an agreement to adopt the victim from the Baptist Children's Home in Valparaiso, Indiana in 1977 when the victim was approximately five or six months old. The adoption was apparently never formally finalized, and the Combs family moved away from Indiana in 1986. The Combs family lived in Clearwater, Florida for several years and then traveled around the country in a camper before eventually settling in Bristol, Tennessee where Petitioner became the pastor at the Emanuel Baptist Church. After enduring years of abuse, in February of 1997, the victim tried to commit suicide by ingesting antifreeze. She was taken to the hospital. During her recovery, medical personnel took note of what were later documented as over 410 scars on the victim's body. The police began an investigation of Petitioner and his wife. As a result of their investigation, Petitioner and his wife were indicted for numerous offenses: Joseph Combs was indicted for one count of especially aggravated kidnapping, two counts of aggravated assault, one count of aggravated perjury, one count of aggravated rape, and seven counts of rape. Evangeline Combs was indicted for one count of especially aggravated kidnapping, three counts of aggravated assault, two counts of assault, and four counts of aggravated child abuse. Petitioner, as well as the Combs' five other children, testified at trial and denied that the victim was abused. At trial, the victim testified about the horrendous years of abuse that she endured and stated that Petitioner told her that her "purpose in life" was to act as a "servant" to the Combs family and on the occasions that she did not perform this function properly, in the estimation of Petitioner, she was punished. *Id.* at *1-*34.

At the conclusion of the trial, the jury convicted Petitioner's wife of one count of especially aggravated kidnapping and four counts of aggravated child abuse. The jury found her not guilty of one count of aggravated assault. Petitioner was convicted of one count each of especially aggravated kidnapping, aggravated assault, aggravated perjury, and aggravated rape, in addition to seven counts of rape. Following a sentencing hearing, Petitioner's wife was sentenced to 65 years of incarceration and Petitioner received an effective sentence of 114 years. *Id.* at *35.

Petitioner appealed his convictions. On appeal, this Court reversed Petitioner's conviction for aggravated perjury and remanded for a new trial on that charge. *Id.* at *83. We affirmed Petitioner's remaining convictions. *Id.*

Subsequently, Petitioner filed a *pro se* petition for post-conviction relief on February 2, 2004. In the petition, Petitioner argued *inter alia* that he was denied equal protection of the law by being

sentenced “outside the parameters of the law” and was denied effective assistance of counsel in a variety of ways. The post-conviction court appointed counsel for Petitioner, and the petition was amended. The post-conviction court held a hearing on the petition.

At the hearing, Petitioner testified that he was shocked by trial counsel’s opening statement. Petitioner claimed that he had no idea what his attorney was going to say in opening statements because they never discussed trial strategy. Petitioner stated that trial counsel informed him that he was investigating the case and that he would do the best job he could. Petitioner claimed that he asked his trial counsel to look into the victim’s motive, i.e., to get money from Petitioner and the Baptist Children’s Home. Trial counsel told him they would talk about it later. Petitioner claimed that conversation never occurred. Petitioner also stated that trial counsel told him at trial that he would have to testify approximately one hour prior to being placed on the witness stand.

Petitioner explained that he was out on bond prior to trial, but that trial counsel did not discuss possible witnesses with him. Petitioner was being held in the county jail when trial counsel was appointed to represent him. According to Petitioner, trial counsel visited him in jail on several occasions, but they did not discuss the case.

Petitioner testified that he asked trial counsel to look into Indiana law regarding child custody because an agency in Indiana had placed the victim in Petitioner’s custody for medical reasons. Trial counsel assured Petitioner that he would look into the law, but no evidence of Indiana law was presented at trial. Petitioner also testified that when he referred to the victim as a “servant,” he meant that she was “God’s servant.” Petitioner was frustrated because trial counsel told him that he would not discuss religion during his cross-examination of the victim.

Petitioner claimed that he asked trial counsel about expert witnesses, and trial counsel responded that he had talked to the State’s witnesses. According to Petitioner, trial counsel refused to call Dr. Sabatino, a professor of psychology and psychiatry at East Tennessee State University, and Dr. Tom Greene, the attending physician at the hospital where the victim was treated, as defense witnesses. Petitioner did not think that trial counsel even discussed the case with Dr. Greene. Petitioner wanted trial counsel to call Dr. Greene to testify that there was no trace of ethylene glycol in the victim’s body.

Petitioner also complained that trial counsel did not introduce proof of his physical limitations at trial. According to Petitioner, he had undergone open heart surgery and was physically incapable of doing some of the things that the victim alleged that he had done. Petitioner also wanted trial counsel to mention that the victim was “released alive” from her alleged kidnapping, but trial counsel did not do so. Petitioner further complained that he did not have any conversations with trial counsel about his appeal and was not given the opportunity to review the brief before it was filed. Petitioner stated that there were issues that he wanted trial counsel to address in his direct appeal that were not included.

Petitioner was also unsatisfied with trial counsel's questioning of the victim. He wanted trial counsel to ask the victim about places that she had been in order to refute the charges of kidnapping. According to Petitioner, trial counsel refused to do so. Petitioner also claimed that there were several witnesses that trial counsel refused to call to the stand. Petitioner felt intimidated by trial counsel, claiming that trial counsel was always "blowing up" whenever Petitioner asked questions about his case.

On cross-examination, Petitioner acknowledged that trial counsel visited him several times while he was in jail, but said that he only saw trial counsel two or three times after being released on bond. Petitioner testified that he thought trial counsel should have argued about the Indiana law at trial, but admitted that he did not become aware of the Indiana law until after trial. Petitioner also admitted that trial counsel informed the jury during opening statements that the victim was a "disturbed young lady" that had an "ulterior motive" for testifying. Trial counsel informed the jury that he would prove that the victim was disturbed through the testimony of her siblings. Petitioner acknowledged that each of his children (other than the victim) testified at trial that neither he nor his wife were responsible for doing anything to the victim. Petitioner also acknowledged that the State brought out the fact that there was a civil lawsuit filed against Petitioner, his wife, and the Baptist Children's Home on the victim's behalf.

Petitioner informed the court that he was a college-educated man and knew at the time he was indicted and throughout the trial that he had a right to testify if he wanted. Petitioner never complained that he had trouble communicating with trial counsel and did not ask for a replacement attorney. Petitioner denied that he and his wife agreed that Dr. Greene would not be called as a witness at trial. Petitioner further admitted that although he had no idea what Dr. Sabatino would testify to, he wanted trial counsel to call Dr. Sabatino to testify at trial.

Joseph F. Harrison of the Sullivan County Public Defender's Office testified that he has been a public defender for nine years and has been licensed to practice law since 1976. He was appointed to represent Petitioner's wife at trial. During trial preparation, he consulted extensively with Petitioner's trial counsel and developed a joint defense. Mr. Harrison's office interviewed Dr. Greene prior to trial and was aware of his potential testimony. Mr. Harrison discussed the results of the interview with trial counsel for Petitioner. Later, Mr. Harrison testified that there was a conference where trial counsel for Petitioner was present along with the other attorneys involved where they all discussed with Petitioner and his wife whether or not to call Dr. Greene as a defense witness. After the conference, Petitioner and his wife decided that they should not call Dr. Greene as a witness for the defense.

Trial counsel testified that he has been licensed to practice law in Tennessee since 1978 and in Alabama since 1976 and is presently in good standing with the Tennessee Bar. Trial counsel's practice is primarily criminal defense, and he has handled cases that range from the death penalty all the way down to DUI and trespassing. Trial counsel was appointed to represent Petitioner. Trial counsel first met with Petitioner while he was incarcerated in the county jail. While Petitioner was incarcerated, trial counsel met with him many times. Once Petitioner was released on bond, trial

counsel met with him at his office. During the course of his representation of Petitioner, trial counsel met with all of the attorneys involved to discuss trial strategy and witnesses.

Trial counsel denied ever frightening or intimidating Petitioner. In fact, trial counsel testified that Petitioner was an extremely intelligent, forthright, direct man that was not frightened of anyone. Petitioner took a very active interest in his defense. Trial counsel stated that he discussed possible opening statements with Petitioner prior to trial and that Petitioner actually wrote down things that he wanted trial counsel to talk about. Trial counsel acknowledged in his opening statement that he would be able to show that the victim was disturbed. During trial, counsel attempted to show this through the testimony of the siblings. Trial counsel also pointed out that the victim had a multimillion dollar lawsuit pending on her behalf against the two defendants and the Baptist Children's Home in Indiana. This evidence was ultimately presented to the jury during trial. Trial counsel denied that he refused to discuss trial strategy with Petitioner and further testified that Petitioner always knew he had a right to testify at trial. According to trial counsel, the basis of the defense was that Petitioner had done nothing wrong and he wanted to testify in order to impart this information to the jury.

Trial counsel remembered preparing Petitioner for his possible testimony. They discussed the case both prior to and during the trial. Petitioner took "copious" notes throughout the trial. Petitioner even thanked trial counsel during trial and thanked him again after the trial. Petitioner never mentioned anything about Indiana law.

Trial counsel stated that he and Petitioner had discussions about calling Dr. Greene as a witness to try to prove that the victim had not ingested antifreeze. However, trial counsel chose not to call Dr. Greene as a witness because he felt that he had already established through other witnesses that the victim did not tell hospital personnel that she was abused or neglected, and trial counsel was afraid that Dr. Greene would testify that the victim was abused. Trial counsel was present at a meeting with Petitioner, his wife, and all the attorneys involved where they made the joint decision not to call Dr. Greene as a witness.

Trial counsel also recalled discussing with Petitioner whether they should request an independent psychological evaluation of the victim. Petitioner asked trial counsel what would happen if the evaluation came back unfavorable. Trial counsel told Petitioner that the State could then call the person who performed the evaluation as a witness. Petitioner told trial counsel that they did not need to ask for an evaluation because Petitioner did not do anything wrong.

Trial counsel claimed he did not know of Dr. Sabatino's existence until the trial. After talking to Dr. Sabatino, he learned that the doctor had interviewed all of the Combs' children with the exception of the victim. Trial counsel further testified that he called many witnesses during trial and most of them came from a list provided by Petitioner. Lastly, trial counsel stated that he hired a private investigator with his own funds to interview some of the potential witnesses.

At the conclusion of the post-conviction hearing, the post-conviction court took the matter under advisement. In an order entered May 11, 2006, the post-conviction court dismissed the petition, finding Petitioner's issues to be without merit. Specifically, the post-conviction court determined:

In our case, the victim as an infant was delivered to the petitioner by the adoption home. She was not adopted and through her life was used as a servant or slave.

The Court does not find that *Sturruv v. Mahan, et. al.*, 261 Ind. 463, 305 N.E.2d 877 (1974) would have been helpful to the petitioner at trial.

....

In our case, the petitioner did not stand in the position of parent to child [;] he stood in the position of slaveholder to slave. The victim in this case would have qualified as property if the pre-civil war slave statutes were still in effect.

The petitioner pre-trial had referred to the victim as a servant of the Combs family and the victim testified to such. The petitioner says his original trial counsel should have developed a type of religious counter-argument to counter the impression that the victim had become a slave.

....

The defense offered . . . the above witnesses to negate the theory that the victim was a slave.

The jury had the issue before them and they discredited the defense. The issue was for the jury. Further, the petitioner testified at trial.

....

Petitioner says that original trial counsel failed to meet with him as much as he should have and that no trial strategy was discussed. Further, petitioner says that counsel failed to prepare or discuss with him the wisdom of testifying at trial.

....

The Court credits the testimony of [trial counsel] and finds this allegation is totally without merit.

....

The petitioner says that original counsel did not develop the issue concerning the lawsuit against the (orphanage) adoption home brought by the victim to recover money.

. . . .

Considering it was developed at trial that there existed a lawsuit against the adoption home, any statement concerning payment for the victim's story would be harmless beyond a reasonable doubt.

[Petitioner claims] trial counsel failed to present evidence of witnesses' bias of Detective Debbie Richmond-McCauley.

. . . .

It appears that the need for a conservator was developed at trial and that McCauley had filed a lawsuit and a guardian was appointed. The Court cannot find that original counsel was deficient in not addressing the issue further at trial.

The petitioner says original counsel for petitioner was ineffective for not calling Dr. Tom Greene, . . .

. . . .

Original counsel duly developed Dr. Greene pre-trial and as a result, the Court cannot find counsel was ineffective or that the petitioner was prejudiced. Greene did not testify at trial or at the post-conviction hearing.

Petitioner alleges that counsel was ineffective by reason of failure to develop that the petitioner had had surgery before an assault and as a result, he was unable to commit an assault.

This issue was discussed upon direct appeal and clearly the heart attack or surgery was before the jury.

. . . .

The petitioner says his original trial counsel was ineffective because he failed to call an expert by the name of Dr. Sabatino

. . . .

Counsel was not ineffective and the petitioner participated in the decision not to call Dr. Sabatino. He concurred.

Petitioner says appellate counsel . . . were ineffective because they did not raise an issue concerning amendment of the presentment during the trial.

This issue was addressed upon direct appeal. . . .

At sentencing, petitioner says original counsel was ineffective by not presenting the theory that the victim was released alive. . . .

The facts at trial indicated that the victim in effect freed herself by ingesting antifreeze. This issue is without merit.

. . . .

In many respects, the post-conviction action is an attempt to revisit issues that were directly before the jury at the original trial. . . . The petitioner has failed to establish by clear and convincing evidence that his [sic] is entitled to post-conviction relief.

Petitioner subsequently filed a timely notice of appeal. On appeal from the post-conviction court's dismissal of the petition for post-conviction relief, Petitioner raises the following issues: (1) whether trial counsel was ineffective for failing to cite Indiana law to establish a "de facto parent-child relationship" as a defense to the kidnapping charges; (2) whether trial counsel was ineffective for failing to properly elicit testimony to rebut or explain the victim's claim that she was a "servant"; (3) whether trial counsel was ineffective for failing to communicate properly with Petitioner and failing to discuss a defense or defense strategy; (4) whether trial counsel was ineffective for failing to provide promised evidence to the jury regarding the victim's ulterior motive to testify; and (5) whether trial counsel was ineffective for failing to use independent medical experts to review medical records and failing to call the victim's attending physician to testify.

Analysis

Post-Conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor may it substitute its inferences for those drawn by the post-conviction court. *See State v.*

Honeycutt, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is *de novo*" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A. Failure to Argue Indiana Law at Trial

First, Petitioner argues that trial counsel was ineffective for failing to argue that Indiana law would negate the Tennessee kidnapping charges. Petitioner contends in his brief that in Indiana, keeping a child, even if illegally, creates a "de facto" parent-child relationship and that if trial counsel had argued this to the jury, the kidnapping charges would have been negated.

At the evidentiary hearing, Petitioner testified that he did not tell trial counsel about the Indiana case because he was not aware of the case until after the trial was over. Trial counsel agreed that Petitioner did not tell him anything about Indiana law.

In the case herein, the post-conviction court determined that the petitioner did not stand in the position of parent to child, but instead in the position of “slaveholder to slave” and that the Indiana case cited by Petitioner would not have bolstered Petitioner’s argument at trial. Thus, the post-conviction court determined that Petitioner failed to show prejudice by trial counsel’s failure to argue Indiana law to the jury. We agree. We fail to see how the holding of a civil case in another state, under an entirely different set of circumstances, can negate Tennessee’s kidnapping laws. The evidence does not preponderate against the post-conviction court’s finding. This issue is without merit.

B. Failure to Address Testimony that Petitioner Referred to Victim as Servant

Next, Petitioner argues that his trial counsel was ineffective for failing to respond to the victim’s direct testimony that Petitioner declared to her that her purpose in life was to be a servant to the Combs family and that trial counsel refused to address this issue when he called Petitioner to testify.

Petitioner testified that he asked trial counsel to show that he told the children they were servants of God, not servants of the family. According to Petitioner, trial counsel refused to get into a religious argument during trial. The post-conviction court noted that trial counsel called various witnesses on Petitioner’s behalf at trial in order to negate the State’s theory that the victim was only a servant. Each of these witnesses testified as to their perception of how the Combs’ children were treated equally. Further, trial counsel called each of the Combs’ children to testify about their everyday lives. The post-conviction court determined that the jury, from its verdict, must have accepted the State’s theory. The post-conviction court found that there was no basis to determine that trial counsel was ineffective or that Petitioner was prejudiced by trial counsel’s strategy. The evidence does not preponderate against this finding. This issue is without merit.

C. Failure to Develop a Defense or Confer with Client

Next, Petitioner contends that trial counsel was ineffective for failing to confer with him to develop a defense and for failing to prepare him to testify at trial.

At the evidentiary hearing, Petitioner claimed that he “never had any discussion at all about any type of plan or approach to the trial” with trial counsel. Trial counsel, on the other hand, testified that they determined early on that Petitioner would testify at trial and that they met often to discuss the case. Trial counsel remembered that Petitioner took a lot of notes and had an active role in the development of the defense.

The post-conviction court noted that trial counsel kept notes from his investigation of the case and even hired a private investigator out of his own funds in order to prepare for trial. The post-conviction court noted that it credited the testimony of trial counsel and found Petitioner's allegations to be totally without merit. "[Q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). This issue is without merit.

D. Failure to Show Victim's Ulterior Motive

Petitioner also argues that trial counsel was ineffective because he promised the jury in opening statements that the evidence would show that the victim had been paid for giving her story to the media. According to Petitioner, trial counsel failed to provide that evidence to the jury. At the hearing, trial counsel testified that he informed the jury that the victim had an ulterior motive because there was a pending multi-million dollar lawsuit against the defendants and the adoption home. Trial counsel also stated that this evidence was presented to the jury by the State and that he spoke improperly during opening statements. What he meant by his statement was that the victim "would be paid or would make money from it."

The post-conviction court determined that because the State developed at trial that the victim had a pending lawsuit against the defendants and the adoption home, any incorrect statements by counsel for Petitioner during opening statements about payment for the victim's story would be harmless beyond a reasonable doubt since the jury obviously rejected the motion that an ulterior motive discredited the victim's testimony. The evidence does not preponderate against this finding. This issue is without merit.

E. Failure to Call Dr. Tom Greene as a Witness

Lastly, Petitioner asserts that trial counsel was ineffective for failing to call Dr. Tom Greene as a witness to contradict the victim's testimony that she drank antifreeze.

At the post-conviction hearing, trial counsel testified that he and Petitioner had discussions prior to trial about calling Dr. Greene as a witness. However, the information they hoped to establish through Dr. Greene's testimony was going to be established through other witnesses. Trial counsel felt that putting Dr. Greene on the stand was a risky endeavor because Dr. Greene could testify that he was of the opinion that the victim was abused. Trial counsel also recalled a meeting with Petitioner, his wife, and the other attorneys involved in which they discussed the matter of Dr. Greene's testimony and ultimately decided not to call Dr. Greene. The post-conviction court determined that trial counsel properly developed the issue pre-trial and, thus, could not find that counsel was ineffective or that Petitioner was prejudiced by trial counsel's failure to call Dr. Greene

as a witness. Additionally, Dr. Greene did not testify at trial or at the post-conviction hearing.¹ As stated previously, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins*, 911 S.W.2d at 347. This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper*, 847 S.W.2d at 528. Trial counsel testified that he prepared for the case, had discussions with Petitioner as well as counsel for Petitioner's wife about the possibility of Dr. Greene testifying at trial, and that the group made the decision not to call Dr. Greene as a witness. This issue is without merit.

Conclusion

Because Petitioner has failed to prove that trial counsel's representation fell below an objective standard of reasonableness or that he was prejudiced by his trial counsel's actions, the post-conviction court properly dismissed the petition for post-conviction relief. The judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE

¹We feel compelled to note that, according to counsel for Petitioner, after the post-conviction court's adverse ruling and after Petitioner filed the notice of appeal, Petitioner filed a motion in the post-conviction court requesting that the court accept an offer of proof from Dr. Greene. Counsel informed this Court that the post-conviction court held a hearing without notice to counsel and denied the requested relief. Counsel apparently filed a motion requesting the post-conviction court reconsider its denial of the motion. Counsel sought an extension of time to file a brief in this Court because the motion was still pending in the post-conviction court. This Court determined that the post-conviction court had no jurisdiction over the matter once the notice of appeal was filed and ordered Petitioner to file his brief. It is not clear from the record whether the post-conviction court resolved the issue regarding the motion. However, this Court's order denying Petitioner's motion for extension of time made clear that the ongoing proceedings in the trial court were a nullity. Petitioner does not raise an issue regarding the motion on appeal.